JOHORE REPORT.

[APPELLATE CRIMINAL JURISDICTION]
McELWAINE C.J. (S.S.) TERRELL and HORNE JJ.
January 18, 1938.

ABDUL RAHMAN BIN IBRAHIM....Appellant
v.
THE PUBLIC PROSECUTOR OF JOHORE .....Respondent

[JOHORE CRIMINAL APPEAL No. 3 of 1938]

Appeal against Sentence—Assault on superior officer as aggravation—Insubordination not ingredient of offence—Principles on which Court of Appeal will interfere with sentence.

In suitable cases the Court of Appeal will reduce or enhance sentences, when, having before them all the material which the trial Judge had before him, they consider, having regard to all the circumstances of the case, that the sentence imposed is manifestly excessive or inadequate.

Acts of insurbordination should not be taken into consideration in cases where insubordination is not an ingredient of the offence charged.

CRIMINAL APPEAL.

The appellant, a clerk in a Government Chandu shop was tried before Mills J. on the 4th May 1938 and was convicted and sentenced to 6 years Rigorous imprisonment for the offence of voluntarily causing grevious hurt to a Superintendent of Customs, Preventive Branch by a dangerous weapon under Section 326 of the Penal Code. He appealed against the conviction and sentence.

Goho for appellant.

Abdul Hamid, Deputy Public Prosecutor for Public Prosecutor.

The facts and arguments appear sufficiently from the Judgment below.

The Judgment of the Court was delivered by—

McELWAINE, C.J.—The appellant was convicted by Mr. Justice Mills at Johore Bahru on 4th May, 1938, on a charge of voluntarily causing grievous hurt to one John Tolmie by means of an instrument for cutting, to wit, a parang, thereby committing an offence punishable under section 326 of the Penal Code and was sentenced to six years rigorous imprisonment.

The appellant alleged that he acted in self defence and that he only threw an ink-stand at Mr. Tolmie and that it was this office accessory that broke Mr. Tolmie's nose. Mr. Tolmie's cuts, appellant alleged, were due to Mr. Tolmie grasping a parang which was on the table by the blade and the appellant struggling to disarm Mr. Tolmie. Mr. Tolmie's evidence was that the appellant who was salesman in a Government chandu shop resented an inspection of the shop by him, a superintendent of the preventive branch of the Johore Customs; that the appellant left the shop, came back with a parang and struck Mr. Tolmie across the face with the parang, breaking his nose.

Mr. Tolmie's story was abundantly corroborated by the Medical Officer whose opinion was that the injury was caused by a sharp instrument and not by the ink-stand which was produced. Another witness saw appellant with a parang in his hand chase Mr. Tolmie down the steps of the shop. A large account book which had been placed on the table for inspection, was almost cut through with a clean cut such as could have been caused by the parang, and corroborated Mr. Tolmie's statement that appellant, before assaulting him, had struck the table with the parang.

There was abundant evidence to justify the judge finding the appellant guilty and the appeal against conviction is dismissed.

The appellant also appeals against the sentence of six years rigorous imprisonment imposed upon him. It appears to us that Mr. Tolmie who was aware of frauds against the revenue committed in other chandu shops entered this shop in which the appellant was salesman expecting to find similar frauds to have been committed there. Anyway, one of Mr. Tolmie's first remarks to the appellant was "I am afraid your game is up." A spirit of sweet reasonableness on both sides was conspicuous by its absence. There was, however, no justification for the serious assault committed by the appellant.

The learned trial judge favoured the Court of Appeal with a report setting out the grounds upon which his judgment and sentence were based.

He appears to have taken into consideration the fact that Mr. Tolmie was the appellant's superior officer as a factor aggravating the offence.

We think acts of insubordination more appropriate for departmental action and that they should not be taken into consideration in cases where insubordination is not an ingredient of the offence charged.

The learned Deputy Public Prosecutor drew our attention to *Rex* v. *Leo de Cruz*, (1934) S.S.L.R. 314; 4 Malayan L.J. page 1 in which the Colony Court of Criminal Appeal said "In determining appeals this Court will ordinarily apply principles which have been laid down by the Court of Criminal Appeal in England. In

regard to appeals against sentence it has been laid down that the Court will not interfere with the sentence, unless the judge has proceeded on wrong principles or given undue weight to some of the evidence.

This Court has profound respect for any decision of a Colony Court of Appeal but it will be observed from the report on *Leo de Cruz's* case that no later decision of the English Court of Criminal Appeal seems to have been cited than two in (1908) 1 Criminal Appeal Reports.

In 1908 the English Court of Criminal Appeal was in its infancy and it then laid down some rules of practice which experience has proved to be too rigid. Its practice in regard to appeals against sentence has since become more flexible, and there have been many recent cases in which sentences have been reduced because the Court thought them more severe than the circumstances of the case warranted.

Cailes, 9 Cr. App. R. 44, *Ralph*, 9 Cr. App. R. 88.
Keats, 9 Cr. App. R. 214, *Bell*, 14 Cr. App. R. 36.
Casey, 14 Cr. App. R. 100, *Clifton*, 18 Cr. App. R. 101.
Whitley, 19 Cr. App. R. 115, *Knell*, 19 Cr. App. R. 169.
Dobson, 22 Cr. App. R. 141, *Bray*, 23 Cr. App. R. 30.

and these illustrations can be multiplied.

This Court will, in determining appeals, ordinarily follow the practice and principles which the Court of Criminal Appeal and the House of Lords prescribe in England, and we will be following the more modern practice if, in suitable cases, we reduce or enhance sentences when, having before us all the material which the trial judge had before him, we consider, having regard to all the circumstances of the case, that the sentence imposed is manifestly excessive or inadequate.

Sentence is, subject to the limits imposed by law, a matter of discretion. The Court of Appeal will not lightly interfere with the exercise of discretion but when the statute under which an appeal is brought provides that the appellate Court shall, if it thinks that a different sentence should have been passed, quash the sentence and pass some other sentence the occasion may well arise when the power conferred should be exercised.

In this respect we see no difference in principle between civil and criminal cases, and we adopt the words of Lord Atkin in *Evans* v. *Bartlam*, (1937) A.C. 479 53 T.L.R. 689 "while the Appellate Court in the exercise of its appellate power is, no doubt, entirely justified in saying that normally it will not interfere with the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it."

Lord Wright in the same case said "But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him the Court of Appeal cannot review his order unless he has applied a wrong principle."

In the present case having considered all the circumstances of the case and having appreciated the gravity of the appellant's crime we think that the sentence imposed was excessive and that a sentence of three years rigorous imprisonment is an adequate punishment. We therefore dismiss the appeal against conviction and we set aside the sentence imposed by the trial judge and in lieu we sentence the appellant to three years rigorous imprisonment to date from 4th May, 1938.

Appeal against conviction dismissed; sentence reduced.

Solicitors for the appellant—
S. C. Goho & Co.